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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 261

ELIZABETH R. GRANVILLE-SMITH, *Petitioner*

v.

EDWARD GRANVILLE-SMITH, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court rendered no opinion. Its order appears at R. 13-14. The *per curiam* opinion of the Court of Appeals (R. 15) is reported at 214 F. 2d 820. Both the District Court and the Court of Appeals decided this case in accordance with opinions rendered by them in *Alton* v. *Alton*. The District Court's opinion in *Alton* appears at 121 F. Supp. 878. The opinion of the Court of Appeals in that case is reported at 207 F. 2d 667.

The *Alton* case was briefed, argued and submitted to this Court at its last term, but was thereafter dismissed as moot. 347 U. S 610. This brief is a revision of the "Brief for the Petitioner" in *Alton*. The principal changes are a new section on the construction of the statutory provisions (p. 11); an additional suggestion as to the inapplicability of due process clause in this case (p. 28); and a substantially revised analysis of full faith and credit (p. 42). The Revised Organic Act of the Virgin Islands, which became law after *Alton*, is cited, and a few additional authorities are included.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 1954 (R. 16). The petition for a writ of certiorari was filed in this Court on August 5, 1954, and was granted on October 14, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Does the due process clause of the Fifth Amendment to the Constitution of the United States prohibit the legislature of the Virgin Islands from making plaintiff's residence within its borders for six weeks prima facie evidence of domicile in a proceeding for divorce?

2. Does the due process clause of the Fifth Amendment to the Constitution of the United States prohibit the legislature of the Virgin Islands from providing that upon proof of six weeks residence of a complaining party in a divorce action where the defendant has been personally served within the district or enters a general appearance, the court shall have jurisdiction of the action without further reference to domicile?

STATUTE INVOLVED

Sections 8, 9 and 9(a) of the Divorce Law of the Virgin Islands[1] read as follows (Section 9(a) is in issue here):

> "Section 8. When a marriage has been solemnized in the district an action may be maintained to declare it void if the plaintiff is an inhabitant of the district at the commencement of the action. If the marriage has not been solemnized in the district, such action can only be maintained when the plaintiff has been an inhabitant thereof for six weeks prior to the commencement of the action.
>
> "Section 9. In an action for the dissolution of the marriage contract or for a legal separation the plain-

[1] Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944, as amended by Act, approved May 29, 1953 (Bill No. 55, 17th Legis. Ass. of the V. I.).

tiff therein must be an inhabitant of the district at the commencement of the action and for six weeks prior thereto, which residence shall be sufficient to give the Court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose.

"(a) Notwithstanding the provisions of sections 8 and 9 hereof, if the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile, and where the defendant has been personally served within the district, or enters a general appearance in the action, then the Court shall have jurisdiction of the action and of the parties thereto without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose."

Section 17 thereof reads as follows:

"Should any section of this law or part thereof be declared invalid by a Court of competent jurisdiction, said declaration shall not invalidate the remainder of this law."

STATEMENT

A. Proceedings in Courts Below

Petitioner brought suit for divorce in the District Court of the Virgin Islands at Charlotte Amalie, St. Thomas on March 16, 1953 (R. 1).[2] Petitioner's verified complaint alleged (i) that she was a resident and inhabitant of the Virgin Islands and had been so for more than six weeks prior to the commencement of the action; (ii) that Respondent was not a resident of the Virgin Islands and that his last known address was Scarsdale, New York; and (iii) that the parties were married in New York City, New

[2] Jurisdiction over divorce actions was vested in the District Court by 48 U.S.C. § 1406(4), superseded on July 22, 1954 by The Revised Organic Act of the Virgin Islands, 68 Stat. c. 588, §§ 21-23, 48 U.S.C. § 1541 note, § 1611-1613. The jurisdiction of the district court over divorce cases was not affected by adoption of the Revised Organic Act.

York, on September 28, 1929, and there are no children of the marriage under twenty-one years of age (R. 1). These allegations were followed by a detailed statement of facts on the basis of which a "state of irreconcilable incompatibility"[3] was alleged to exist between the parties (R. 1-3). The complaint prayed for a decree of absolute divorce. No relief relating to alimony or property was asked (R. 9).

Respondent entered an appearance, acknowledged receipt of the complaint, and waived service of summons (R. 6). He filed a verified answer in which he alleged lack of sufficient knowledge and information upon which to form a belief as to petitioner's allegation that she was a resident and inhabitant of the Virgin Islands and had been so for more than six weeks (*Ibid*). He admitted the allegations in the complaint concerning his last known address, the date and place of the marriage, and the absence of children under twenty-one (*Ibid*). He denied all of the other allegations. Respondent simultaneously filed a "Waiver and Consent" in which he "agree[d] to the hearing of this cause as if by default", and he "consent[ed] to the making and entry of such findings of fact and conclusions of law and decree as to the Court may seem just and reasonable" (R. 6).

Testimony was thereafter taken before a Commissioner (R. 8). Petitioner testified that she became a resident of the Virgin Islands on February 1, 1953 (R. 8). Testimony was also taken in support of other allegations in the complaint (R. 8-9). Each party was represented by counsel (R. 9). No testimony was offered in behalf of Respondent.

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[3] "Incompatibility of temperament" constitutes one of eight grounds for divorce in the Virgin Islands. Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944 § 7(8). It has been construed to mean "disharmony * * * so deep and intense as to be irremediable", not merely "those petty quarrels and minor bickerings which are but the evidence of that frailty which all humanity is heir to". *Burch* v. *Burch*, 195 F. 2d 799, 807 (C.A. 3, 1952). This basis for divorce was in substance carried over from the Danish law in force in the Islands prior to 1920. See *Burch* v. *Burch*, Id. at 805.

On March 20, 1953, the Commissioner filed findings of fact which included, among others, a finding that Petitioner had been a resident in the Virgin Islands for more than six weeks prior to commencement of the action (R. 10). He concluded as a matter of law that a "state of incompatibility of temperament exists between the parties, which entitles the plaintiff to a decree of divorce absolute" (*Ibid*).

The proceedings were thereafter held in abeyance pending disposition of the appeal in *Alton* v. *Alton*. The *Alton* case was dismissed as moot by this Court on June 1, 1954, 347 U. S. 610. On June 21, 1954, petitioner's attorneys moved the District Court to confirm the Commissioner's report (R. 11). At a hearing on the motion, the Court inquired of counsel for Petitioner "whether you have any more evidence to offer on the question of domicile" (R. 12). Petitioner's counsel said he had none, and directed the attention of the Court to Section 9(a) of the Virgin Islands divorce law, p. 3, *supra* (*Ibid*). The Court ruled that Section 9(a) was not "sufficient to confer jurisdiction on this Court to grant this divorce" (R. 12). On June 21, 1954, the Court entered an order, dismissing the complaint on the sole ground that the Court lacked jurisdiction over the Plaintiff (R. 13). The Court relied in its order on the opinion it had rendered in *Alton* v. *Alton*, 121 F. Supp. 878 (D. Vir. Is. 1953).

On appeal, the Court of Appeals for the Third Circuit considered the matter *en banc* (R. 15). It affirmed the judgment of the District Court *per curiam* on the basis of its opinion in *Alton* v. *Alton*, 207 F. 2d 667 (C.A. 3, 1953). In that case the Court of Appeals held by a vote of four to three that the due process clause of the Fifth Amendment rendered invalid Section 9(a) of the Divorce Law of the Virgin Islands.[4]

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[4] Majority opinion by Goodrich, J., Maris, McLaughlin and Staley, J.J., concurring; dissenting opinion by Hastie, J., with whom Biggs, C.J., and Kalodner, J., concurred. The Court noted in its opinion in this case that "individual members of the Court have not modified their views as set out" in *Alton* v. *Alton* (R. 15).

B. The Legislation and Its History

The Virgin Islands were acquired by the United States in 1917 by purchase from Denmark. They consist of two "districts", the Municipality of St. Thomas and St. John (comprising principally the two Islands of those names) and the Municipality of St. Croix. Their total population is approximately 26,665 (1950 census).

The Legislative Assembly of the Virgin Islands has full authority to enact laws with respect to the subject of divorce.[5] It also has authority to regulate the jurisdiction and procedure of the District Court of the Virgin Islands on that subject. The laws of the Virgin Islands are, of course, subject to due process limitations. Congress provided in the Organic Act that "no law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law" (48 U.S.C. 1406g; Revised Organic Act, 48 U.S.C. § 1561), and the due process clause of the Fifth Amendment has been held applicable to the Virgin Islands. *Soto* v. *United States*, 273 Fed. 628 (C.A. 3, 1921); *Thornberg* v. *Jorgensen*, 60 F. 2d 471 (C.A. 3, 1932); cf. *Balzac* v. *People of Puerto Rico*, 258 U.S. 298, 312-313.

On March 3, 1917, the Congress provided that local laws in force on the date of acquisition should continue in effect so far as consistent with changed sovereignty. 48 U.S.C. § 1392. Pursuant to this provision, the Danish

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[5] The Revised Organic Act of the Virgin Islands provides (Section 5, 48 USC § 1571) that the "legislative power * * * shall be vested in a legislature" and that the legislature "shall have and exercise all of the authority and attributes, inherent in legislative assemblies." Under Section 8, 48 USC § 1574, "The legislative authority and power of the Virgin Islands shall extend to all subjects of local application not inconsistent with this Act or the laws of the United States made applicable to the Virgin Islands * * *." The Organic Act contained an identical provision, 48 USC § 1405r. The Court of Appeals has characterized the Legislature's power with respect to divorce as "on a par with the States" (207 F. 2d at 669).

law relating to divorce was in force until the Colonial Councils in 1920 and 1921 adopted Codes of Law for St. Croix and St. Thomas-St. John, respectively. (See *Burch* v. *Burch*, 195 F. 2d 799, 805 (C.A. 3, 1952)).

Since the adoption of those Codes, the islands have provided for divorce jurisdiction as to "inhabitants" who had a "residence" of specified duration.[6] In St. Thomas-St. John, between 1920-1921 and 1939 the "residence" period was six months. On October 2, 1939, it was reduced to six weeks.

In 1944 the Legislative Assembly adopted a divorce law applicable to the entire Virgin Islands.[7] This law included the six weeks "residence" requirement.[8]

Until after the decision of the Third Circuit in *Burch* v. *Burch*, 195 F. 2d 799 (April 16, 1952), it was *not* the practice in the Virgin Islands to offer any proof whatever in divorce actions with respect to domiciliary intent. Jurisdictional requirements were satisfied, according to accepted practice, by proof that the plaintiff lived in the district at the commencement of the action and had lived there continuously for the prescribed period. The legal profession of the Virgin Islands, prior to March, 1953, did not ask complainants in divorce actions, the "Nevada" question as to their intent "permanently or indefinitely" to remain in the jurisdiction.[9] The decrees of the court in divorce actions also made no reference to "domicile" or domiciliary intent. So far as can be ascertained, this continued the practice in the islands under Danish law.

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[6] Title III, c. 44, Code of the Municipality of St. Thomas and St. John, approved March 17, 1921.

[7] Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944.

[8] We attach as Appendix "A" a tabulation of the number of divorces granted in the Virgin Islands from 1940 through 1953.

[9] See Powell, *And Repent at Leisure*, 58 Harv. L. Rev. 930, 945, n. 36 (1945) quoted note 30 *infra*.

It is also reasonable to believe that the legislative authorities of the Virgin Islands did not in fact intend that the jurisdictional provisions of the divorce laws enacted and modified from time to time should be construed to require proof of domiciliary intent. The legislators were undoubtedly aware of the accepted local construction of the provisions, and they did not change them until after *Burch* v. *Burch, supra.*

In April, 1952, however, the Court of Appeals for the Third Circuit decided *Burch* v. *Burch, supra.* In that case, the Court of Appeals took the occasion to state that the words "inhabitancy" and "residence" in Sections 8 and 9 of the Divorce Laws of the Virgin Islands "must be taken to mean 'domiciliary' and 'domicile' ". See *Williams* v. *North Carolina* (I), 317 U.S. 287, 298; *Williams* v. *North Carolina* (II), 325 U.S. 226, 229.

On March 20, 1953, the Judge of the District Court of the Virgin Islands stated that *Burch* v. *Burch* prohibited him from signing decrees based on residence for six weeks, as had been the custom previously, without proof of domiciliary intent. Immediately the legislature proceeded to make its meaning clear and its intent unmistakable. On March 27, 1953, it enacted a bill eliminating references to "inhabitant" and "residence", and providing for jurisdiction in divorce actions when the plaintiff is "physically present" in the district at the time of the commencement of the action and has been "physically present" for six weeks prior thereto. (Bill No. 54, 17th Legislative Assembly, 2d Sess., March 27, 1953. The text of this bill is set forth as Appendix "B").

This bill was vetoed by the Governor on April 22, 1953, on the ground that divorce jurisdiction should not be exercised merely on the basis of six weeks physical presence "without the appearance of the defendant in the action or without a personal service of the complaint upon the defendant." The Governor stated that if this deficiency

were supplied, "the moral objection shall have disappeared." (The veto message is appended hereto as Appendix "C").

The legislature thereafter, on May 19, 1953, enacted the bill quoted above as Section 9(a), and also added the separability provision of Section 17 also quoted, p. 3, *supra*. The Governor signed the new bill on May 29, 1953. Bill No. 55, 17th Leg. Assembly, 3d Sess. 1953.

C. The Opinions in *Alton* v. *Alton*

(1) As evidenced by their opinions in *Alton* v. *Alton*, all seven members of the Court of Appeals concurred in the construction of the statute here in issue. They agreed that Section 9(a) consists of two separable provisions (207 F. 2d at 670, 678). The first provision is a procedural rule that proof of six weeks continuous presence within the district by the plaintiff "shall be *prima facie* evidence of domicile." It merely casts upon the defendant the duty of producing some evidence contesting domicile, p. 17, *infra*. Thereupon, the effect of the presumption is dissipated. Domicile is still the basis of divorce jurisdiction under this section.

The second provision states that (i) where the plaintiff has been continuously present within the Virgin Islands for six weeks immediately prior to filing the complaint and (ii) where the defendant has been personally served within the jurisdiction or enters a general appearance, the Court shall have jurisdiction "without further reference to domicile." Both majority and the minority were in accord in *Alton* that by this provision the "Legislative Assembly intended to confer jurisdiction to divorce regardless of domicile" (207 F. 2d at 673, fn. 17; 678).[10]

[10] The District Court likewise construed the first provision of Section 9(a) as a "procedural statute setting forth the procedure for the Court in finding *prima facie* evidence of domicile", and it approached the second provision on the assumption that the legislature had made domicile "unnecessary" (121 F. Supp. at 882).

(2) The majority of the Court of Appeals (Opinion per Goodrich, J.), decided in *Alton* v. *Alton* that each of these provisions was unconstitutional. It held that the first provision, creating a rebuttable presumption of domicile from six weeks' continuous presence in the district, is unconstitutional under the due process clause because the fact of physical presence for the period has no "rational connection" with domicile. *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U.S. 35. The Court suggested that the "reasonableness" of a legislative presumption must be more clearly established where the issue is "jurisdictional" than where it pertains to the merits (207 F. 2d at 671-672). In considering the reasonableness of the provision, the Court felt that the *prima facie* character of the presumption should be discounted because many divorce actions are uncontested (207 F. 2d at 672).

As to the second provision of Section 9(a), the Court held that the due process clause of the Federal Constitution requires a territory or a state to base divorce jurisdiction on the domicile of at least one party (207 F. 2d at 677). It was of the view, in other words, that a state or territory lacks power to provide for the exercise of divorce jurisdiction on the basis of residence and personal jurisdiction of the parties without reference to domiciliary intent. It was of the opinion that a divorce granted on this basis would not be entitled to full faith and credit, and it held that a legislature was without power to authorize a divorce which would not be protected by the full faith and credit clause.

(3) Biggs, C. J., and Hastie and Kalodner, J. J., dissenting, (per Hastie, J.), held that the legislature had power to make continuous presence for six weeks *prima facie* proof of domicile. They stated that such presence was reasonably related to and rationally connected with domicile (207 F. 2d at 679). They were of the opinion that the "jurisdictional" character of the issue did not

adversely affect the validity of the presumption; and that the expected frequency with which the *prima facie* presumption would or would not be challenged did not affect the fairness of the presumption and, therefore, did not modify the power of the legislature to prescribe it (207 F. 2d at 680). Finally, they challenged the application of the due process clause because the presumption does not deprive any person of a full opportunity to challenge the domiciliary claim.

As to the second clause of the statute, the dissenters stated that "domicile" was a judicial rule subject to legislative change, and not a constitutional principle (207 F. 2d at 681). They discussed the history of the domicile rule in the courts and pointed to the experience of other English speaking countries which have by legislation departed in various circumstances from a domiciliary rule for divorce jurisdiction (207 F. 2d at 682). They concluded that there "is room for difference of judgment" as to the merits of the domicile rule and that the legislature here has avoided the disregard of "interests on defendant's side which is the greatest weakness of the domiciliary rule" (207 F. 2d at 683). Accordingly, they were of the view that the due process clause did not prevent the legislature from authorizing divorce jurisdiction without reference to domicile.

D. The Construction of the Statutory Provisions

Since the respondent appeared generally in this action, either provision of the amendment would serve to provide a jurisdictional basis for this suit.[11] Accordingly, if either is constitutional the judgment below must be reversed.

In construing the second provision of the amendment it is important to note that the legislature's first attempt to

[11] Section 17 of the Divorce Act, p. 3, *supra*, provides that a decision invalidating one section of the Act shall not void the remainder of the statute.

change the Virgin Islands law, after the decision in *Burch* v. *Burch*, *supra*, took the form of a simple bill basing jurisdiction solely upon the "physical presence" of the plaintiff for six weeks prior to the commencement of the action (see Appendix B hereto).[12] There can be no doubt that the legislature intended by this bill to eliminate the requirement for proof of domiciliary intent that the Court of Appeals held necessary under the prior law.

In his message vetoing this bill, the Governor stated that "it has been suggested" that six weeks' presence should be sufficient "to give the District Court jurisdiction in those cases only where the defendant is personally served within the district or enters a general appearance in the action" (see Appendix C hereto).

It seems clear that the legislature intended to incorporate this suggestion in the second provision of the amendment here in issue.[13] They intended, in other words, to make *Burch* v. *Burch* inapplicable where the defined circumstances existed. They retained the requirement of six weeks' presence which appeared in the earlier bill, and by restricting the applicability of the provision to cases where the defendant was generally subject to the jurisdiction of the court they satisfied the Governor's objections. As he said, this being done "the moral objection [presumably to the *ex parte* feature of the earlier bill] shall have disappeared."

The Court of Appeals was of the opinion that by this provision the legislature "without a doubt . . . intended to confer jurisdiction to divorce regardless of domicile" (207 F. 2d at 673, fn. 17). As noted above, all of the seven judges were of the same opinion, as was the District Judge.

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[12] Since *Burch* v. *Burch*, 195 F. 2d 799 (C.A. 3, 1952), the District Court has frequently conducted *sua sponte* a searching inquiry into "domicile" and "domiciliary intent". See *Berger* v. *Berger*, 210 F. 2d 403 (C.A. 3, 1954), p. 24, *infra*.

[13] Counsel have examined the typewritten "Proceedings and Debates"; Second Session and Third Session, Legislative Assembly of the Virgin Islands, on March 27, 1953, and May 11-May 20, 1953, respectively, at which the amendments were discussed, but they are uninformative.

The construction of this provision by the lower courts is entitled to the greatest weight under the decisions of this court. The District Court, which possesses both local and federal jurisdiction, acted in this case as a local court construing an act of the local legislature.[14] The Court of Appeals reviewed the case as if it were the Supreme Court of a state. In reviewing judgments of the Virgin Islands District Court, it examines the record *de novo.* See *People of Virgin Islands* v. *Price,* 181 F. 2d 394, 398-399 (C.A. 3, 1950); *Callwood* v. *Kean,* 189 F. 2d 565, 581 (C.A. 3, 1951); *Berger* v. *Berger,* 210 F. 2d 403, 404 (C.A. 3, 1954). Both courts are familiar with the local history and institutions of the Virgin Islands.[15]

This Court has repeatedly held that to reverse the judgment of a territorial tribunal "on such a local matter as the interpretation of an act of the local legislature * * * the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous." *Sancho* v. *Texas Co.,* 308 U. S. 463, 471; *Waialua Agricultural Co.* v. *Christian,* 305 U. S. 91; *De Castro* v. *Board of Commissioners of San Juan,* 322 U. S. 451.[16]

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[14] At the time suit was commenced, the Organic Act expressly vested the District Court with jurisdiction over "all cases of divorce and annulment of marriage" (48 U.S.C. § 1406). The Revised Organic Act provides (48 U.S.C. § 1612) that the District Court "shall have the jurisdiction of a district court of the United States in all causes arising under the constitution, treaties, and laws of the United States * * *" and "it shall have general original jurisdiction in all other causes in the Virgin Islands, exclusive jurisdiction over which is not conferred by this Act upon the inferior courts of the Virgin Islands." The inferior courts are not given jurisdiction over divorce cases (48 U.S.C. § 1613).

[15] See for example, the exhaustive review of the history of divorce legislation in *Burch* v. *Burch,* 195 F. 2d 799 (C.A. 3, 1952) (Opinion per Maris, J.). The Court of Appeals holds an annual session in the Virgin Islands.

[16] Decisions by the District of Columbia courts on points of local law are not disturbed by this Court unless "egregious error has been committed." *Fisher* v. *United States,* 328 U.S. 463, 476; *Griffin* v. *United States,* 336 U.S. 704, 717-719.

SUMMARY OF ARGUMENT

The first provision of the statute is valid. It creates a *prima facie* procedural presumption of domicile which vanishes upon the introduction of contrary evidence. Domicile is retained as a basis of jurisdiction. The facts to be proved—six weeks' continuous residence—have a rational connection with domicile. These facts prove one of the elements of domicile and are evidence as to domiciliary intent. It is clearly within the legislative power to prescribe this rule of procedure and it does not violate the due process clause. The fact that the presumption relates to a "jurisdictional fact" does not alter the result. It is also of no consequence that divorce cases are infrequently contested. The prima facie presumption does not obstruct the opportunity to contest. In fact, the Virgin Islands law and procedure are unusually solicitous about affording an opportunity to contest and contests occur.

The second provision of the statute is valid. The legislature has power to provide that the court shall have jurisdiction in divorce actions upon proof of six weeks' continuous presence and personal jurisdiction over the defendant "without further reference to domicile." There is doubt that due process considerations are appropriate in this case since there is no contention of injury by any person. Fundamentally, however, domicile is not a constitutional requirement of divorce jurisdiction, beyond the power of a legislature to modify or abolish. A state or territory has full power to grant divorces on whatever basis it sees fit, consistent with procedural due process, and such divorces are valid within its own borders. That is the only issue here. The applicability or non-applicability of the full faith and credit clause does not determine the constitutional validity of the statute. In any event, a decree under the statutory provision under consideration would be entitled to full faith and credit.

ARGUMENT

I. THE ISSUE

In the present case, the court has personal jurisdiction of both parties. This case, therefore, does not involve the issue of power to grant divorces where the defendant is not personally subject to the jurisdiction of the court, although the first provision of the law, creating a rebuttable presumption, is by its own terms available in those circumstances. Further, the case is here as a result of appeal from the court in which jurisdiction to grant the divorce is claimed to exist. It does not present the question of the extra-territorial effect, if any, to be given to a decree obtained under and by reason of the statutory provisions in issue.[17]

The question involved, therefore, is whether, in a case where the defendant appears generally, the Constitution of the United States deprives a legislature of power to provide for jurisdiction in divorce cases unless it requires affirmative evidentiary proof of domiciliary intent. The Court of Appeals stated that such testimony as to domiciliary intent is frequently "evasive or even perjured" (207 F. 2d at 673). We believe that it was error to hold that the requirement of such testimony is a constitutional imperative forever beyond the power of the states or territories to affect or abolish.

At the outset it is necessary to note that there is doubt that the due process clause is applicable in the circumstances of this case. No "person" is here complaining or is being deprived of any rights or privileges, procedural or substantive.[18]

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[17] Congress has provided that the official acts, records and judicial proceedings of a territory shall be entitled to full faith and credit (28 U.S.C. §1738). We believe divorces granted pursuant to this statute would be entitled to full faith and credit, p. 45, *infra*.

[18] See discussion, pp. 28-29, *infra*.

II. THE PRESUMPTION IS VALID

The majority of the Court of Appeals held that the due process clause forbids a legislature from providing that "if the plaintiff is within the district at the time of filing of the complaint and has been continuously for six weeks prior thereto, this shall be *prima facie* evidence of domicile." Its view was that six weeks' presence does not create a "rational foundation on which to base a finding of domicile" (207 F. 2d at 671). Absent proof of intent, six weeks' residence, said the court, "tends to establish nothing but the fact of six weeks' physical presence" (*Ibid*). On the other hand, the dissent considered the presumption entirely proper, pointing out that the period of presence within the jurisdiction establishes one of the elements of domicile and is evidence as to domiciliary intent (207 F. 2d at 679).

The majority sought to buttress its conclusion by two arguments: (1) that there should be more difficulty in supporting a jurisdictional presumption than in sustaining other kinds of presumptions, *e.g.*, a presumption permitting an inference of negligence to be drawn from named operative facts (207 F. 2d at 671); and (2) because most divorce actions are uncontested, the procedural or *prima facie* character of the presumption should be substantially disregarded (*Id.* at 672).

The court recognized that in many cases the presumption "will doubtless eliminate" "evasive or even perjured testimony", but it said that a finding of domicile would be "contrary to the true fact in the great majority of cases" (*Id.* at 673). The court accordingly held the presumption invalid.

1. The Presumption Is Reasonable

There can be no doubt of the power of the legislature to create evidentiary presumptions. This Court has held that:

> "Each state possesses the general power to prescribe the evidence which shall be received and the effect which shall be given to it in her own courts, and may exert this power by providing that proof of a particular fact, or of several taken collectively, shall be prima facie evidence of another fact." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 81.

The rule governing the application of legislative presumptions was stated in *Mobile, J. & K.C.C.R. Co.* v. *Turnipseed*, 219 U.S. 35, as follows:

> ". . . it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. 'If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'" 219 U. S. at 43.

In this case, as in *Turnipseed, supra*, the effect of the presumption is solely "to cast upon [the defendant] the duty of producing evidence to the contrary. When that is done the inference is at an end" and the question is to be decided upon all of the evidence.[19] As the District Court stated, "this is a procedural statute" (121 F. Supp. at 882). The presumption in this case does not

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[19] "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof, there is nothing to justify a finding based solely upon it." *Potts* v. *Pardee*, 220 N.Y. 431, 433, 116 N.E. 78, 79 (1917).

create an inference which is given the effect of evidence to be weighed against opposing testimony, and which prevails unless such testimony is preponderant. Cf. *Western & A. R. R.* v. *Henderson*, 279 U. S. 639. It "does not operate to preclude any defense." *Cockrill* v. *People of California*, 268 U. S. 258, 261; *Easterling Lumber Co.* v. *Pierce*, 235 U. S. 380. The presumption simply makes it unnecessary for the plaintiff to introduce evidence of domiciliary intent unless the defendant or the trial court itself[20] adduces conflicting evidence on that issue.

There can be no doubt that there is "some rational connection" between continuous presence for a period of time and domicile. It is, of course, true that evidence as to continuous presence would not logically be conclusive of an intention to remain indefinitely.[21] But the function of a presumption is always to bridge a gap between the facts shown and the conclusion to be established. *Cf.* Morgan and Maguire, *Cases on Evidence*, p. 84-85 (1942 ed.). A classic illustration is the presumption that where freight is delivered in good order to an initial carrier and in bad order to a consignee by a terminal carrier, it is presumed that the damage was caused by the terminal carrier, although the property may have been transported over the lines of several connecting carriers, any one of which may have been at fault. *Id.* at p. 89. In various jurisdictions the gap between six weeks' presence and domicile is customarily bridged by formal evidence of a dubious character (see p. 20, *infra*). Certainly the legislature does not violate the Bill of Rights

[20] See *Berger* v. *Berger*, 210 F. 2d 403 (C.A. 3, 1954), p. 24, *infra*.

[21] Domicile has been more accurately defined in these terms: "[The] essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere." Story, *Conflict of Laws* § 43 (1834). The intention to stay for a time to which a person "did not then contemplate an end" was held sufficient in *Williamson* v. *Osenton*, 232 U.S. 619, 625. See also *Bergner and Engel Brewing Co.* v. *Dreyfus*, 172 Mass. 154, 51 N.E. 531 (1898) (per Holmes, J.)

when it undertakes to bridge the gap by a procedural presumption.

Indeed, the connection between the fact to be proved and the inference to be drawn is more logical in the present case than in many cases where presumptions have been sustained. In *Turnipseed*, absent the presumption, proof that the injury was inflicted by a railroad car, without more, would not indicate negligence on the part of the railroad. It would be a neutral fact with respect to the issue of responsibility. In *Yee Hem* v. *United States*, 268 U. S. 178, the presence of opium within the United States would not normally lead to an inference as to when it had been imported. Nevertheless, this Court sustained a statute providing that in such instance the opium "shall be presumed to have been imported after" a certain date. "If the effect of the legislative act is to give to the facts from which the presumption is drawn an artificial value to some extent, it is no more than happens in respect of a great variety of presumptions not resting upon statute." *Yee Hem* v. *United States*, *supra*, at 185. This Court has never declared unconstitutional on grounds of due process a state statute applicable to civil proceedings which created merely a temporary inference of fact that vanished upon the introduction of opposing evidence.[22]

[22] State statutes creating presumptions have been frequently upheld by this Court against contentions that due process was being violated. *Adler* v. *Board of Education*, 342 U.S. 485; *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233; *Hawkins* v. *Bleakly*, 243 U.S. 210; *Easterling Lumber Co.* v. *Pierce*, 235 U.S. 380; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61. The statute creating an inference of negligence in accidents involving a railroad was struck down in *Western & A. R. R.* v. *Henderson*, 279 U.S. 639, because the trial "court necessarily permitted the presumption to be considered and weighed as evidence against the testimony of defendant's witnesses tending affirmatively to prove such operation was not negligent in any respect." 279 U.S. at 642. The offense against due process thus consisted in the use of a presumption as evidence. See *Atlantic Coast Line R. Co.* v. *Ford*, 287 U.S. 502, 507-508.

The civil presumption in *Ogama* v. *State of California*, 332 U.S. 633, was held repugnant to the equal protection clause.

The Court of Appeals was of the opinion that a presumption as to domicile based on a period of residence, however long, would present difficulties because it "jumps the difficult phase in the proof of domicile, namely, the intent to make a home in the place where domicile is claimed" (207 F. 2d at 671). In practice, however, especially in jurisdictions with a large volume of divorce litigation, proof of continuous presence in a jurisdiction for a period of time is usually the only substantial fact from which domiciliary intent may be inferred. Testimony as to intent, and evidence, where it is elicited, as to such matters as obtaining a driver's license, a library card, or even employment, is apt to be of debatable reliability in the search for "domicile". Indeed, such testimony is apt to be no more than elaborate embellishments of a basically "evasive or perjurious ritual." It is certainly not unreasonable for a legislature to enact a *prima facie* rule dispensing with evidence on these points in the absence of contest, and providing a procedural presumption from the basic and objective facts of evidence.

A presumption of domicile in divorce cases based upon residence was recently upheld by the New Mexico Supreme Court after an elaborate analysis of the problem. *Crownover* v. *Crownover*, 274 P. 2d 127 (N. M. 1954). A New Mexico statute provides that military personnel continuously stationed in any military base in New Mexico for a period of one year shall be "deemed residents in good faith" for purposes of divorce jurisdiction. The Court concluded that this "statutory presumption is not unconstitutional" because "there is a rational connection between the fact proved (one year continuously stationed in New Mexico) and the fact presumed (domiciliary intent)" (274 P. 2d at 133). The Court recognized that it was extending "the idea of domicile beyond the area of the integrity of individual intent to an area which might be called 'military domicile' in which individual intent has no place." (*Ibid*). The court ruled that given proof

that the plaintiff was continuously stationed in the state for one year, the "presumption of domicile is conclusive" (*Ibid*). Cf. *Mills* v. *Mills*, 153 Fla. 746, 15 So. 2d 763 (1943); *Craig* v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936), p. 38, *infra*.

The length of residence required as a basis for the presumption is peculiarly a legislative and not a judicial function. "Long residence does not constitute nor does brief residence negative domicile." Cheshire, *Private International Law* 160 (4th Ed. 1952). The period specified here as a basis for the presumption continues the pre-existing standard of the Virgin Islands. It also reflects the practice in a number of states and is not greatly different from the period prescribed by others.[23]

2. It Is Immaterial That the Presumption Relates to a Jurisdictional Fact

The Court of Appeals in *Alton* cited no precedent for its novel suggestion that a heavier burden exists where the fact presumed is jurisdictional than where it is one of the ultimate facts relating to the merits. In *Yee Hem* v. *United States*, 268 U.S. 178, this Court upheld a federal statute creating a presumption as to a jurisdictional fact, namely the importation of opium after a specified date. No reference was made to the jurisdictional character of the fact presumed. See also *Tot* v. *United States*, 319 U. S. 463.

Indeed, it is arguable that if a distinction is to be made between presumptions of jurisdictional fact and those relating to the merits, the balance should be exactly the opposite of that suggested by the Court of Appeals. A jurisdictional presumption serves merely to obtain a hearing on the merits. Other presumptions make inroads on the presumption of innocence, *Yee Hem* v. *United States*, 268

[23] In Idaho, Nevada, and Arkansas, jurisdiction is based upon six weeks' residence. Ida. Code (1947) § 32-701; Nev. Comp. Laws (1929) § 9460; Ark. Stat. (1947) § 34-1208. Sixty days are required in Wyoming, Wyo. Comp. Stat. (1945) § 3-5407, and 90 days in Florida, Fla. Stat. Anno. (1943) § 65.02.

U. S. 178; *Hawes* v. *Georgia*, 258 U. S. 1, or may result in the loss of citizenship, property, or employment unless successfully contested. *Luria* v. *United States*, 231 U. S. 9; *Cockrill et al.* v. *People of State of California*, 268 U. S. 258; *Adler* v. *Board of Education*, 342 U. S. 485.

3. The Likelihood of Contest Is Immaterial

The Court of Appeals felt that the fact that most divorce actions are not actually contested has a bearing upon the reasonable character of the presumption (207 F. 2d at 672). It is probably true in our society that only a small percentage of divorce cases is contested. But this has nothing to do with the reasonableness of the presumption. It is true regardless of where the divorce actions are brought, and even if they are filed in the matrimonial domicile. For example, the Court of Appeals itself points to the infrequency of contest in Maryland which it says has "almost no migratory divorce problem" (*Ibid*). The infrequency of contest indicates nothing except that both spouses usually join or acquiesce in the conclusion that their differences are irreconcilable and that the marriage should be dissolved. The *prima facie* presumption will not increase or decrease the frequency of contests. A defendant who would not contest jurisdiction under this statute would not contest the plaintiff's evidence as to domicile. The relevant fact is that the presumption leaves the opportunity to contest completely unimpaired.

The Virgin Islands procedure includes all of the conventional and some unusual provisions to assure notice and opportunity for contest, and since *Burch* v. *Burch*, the court itself has conducted searching inquiries into domicile.

If the defendant is within the jurisdiction, personal service is, of course, required. If the defendant is not within the jurisdiction, the plaintiff must make affidavit to that effect (See R. 3-4). Thereupon, the court orders either that a copy of the summons and complaint be sent by registered mail to the defendant's last known address and notice be given by publication in a Virgin Islands

newspaper (R. 4-5), or that personal service of the summons and complaint be made upon the defendant outside of the jurisdiction.[24]

A special appearance may be filed to contest jurisdiction. Objections raised informally by letter as well as by formal pleadings are entertained. Even telephone calls are meticulously noticed where opposition is indicated. The practice is to notify counsel for the plaintiff that opposition has been indicated, and this frequently results in withdrawal of the complaint, as we discuss below. The court will hold hearings on jurisdiction, and if the court believes that it does not have jurisdiction and the complaint is not withdrawn, the complaint will be dismissed. See *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954), p. 24, *infra*. If the court determines that it has jurisdiction, the defendant may proceed on the merits or may appeal on the basis of his special appearance. Appeals may be taken to the Court of Appeals for the Third Circuit which reviews the record *de novo*. *Clen* v. *Jorgensen*, 265 Fed. 120, 124 (C. A. 3, 1920); *People of Virgin Islands* v. *Price*, 181 F. 2d 394, 398 (C. A. 3, 1950); *Burch* v. *Burch*, 195 F. 2d 799, 804 (C. A. 3, 1952).

We have appended hereto as Appendix "D" to this brief and filed with the Clerk of this Court a certified copy of a certificate by the Clerk of the District Court of the Virgin Islands setting forth the results of a detailed study of the disposition of 310 of the 343 cases "concluded" in 1952. These are all of the cases in that category in the Municipality of St. Thomas and St. John, the balance being in St. Croix. This study shows that of the 310 cases, only 31 were disposed of *ex parte*, that is, without an answer being filed or appearance entered. In 257 cases, answers were filed and general appearance was entered although no conflicting evidence tendered by the parties. In four cases, the defendant appeared specially to contest jurisdiction. In thirteen, the complaint was withdrawn, either before or after answer or hearing. The Clerk's certificate notes that some

[24] Code of Municipality, St. Thomas-St. John, Tit. III, Ch. 4 § 7.

of these were discontinued after jurisdictional issues were raised by informal communication. In two cases, contest resulted in adversary trial of the issues as to jurisdiction and on the merits; and in two, cross bills were filed by the defendant. The Court of Appeals accordingly was mistaken in saying that 343 divorce cases were "concluded" in 1952, and only one was "contested" (207 F. 2d at 672).[25]

The foregoing figures not only evidence the fact that defendants have ample opportunity for contest under Virgin Islands procedure, but they also show that defendants usually participate in the proceedings, and occasionally actively dispute the plaintiff's allegations. The *prima facie* presumption will not impair the defendant's opportunity to appear specially and contest the plaintiff's allegations of domicile.

The majority of the Court of Appeals also ignores the fact that the District Court may, and occasionally does, *sua sponte*, inquire as to jurisdictional facts even in the absence of the defendant. This is demonstrated by *Berger* v. *Berger*, 210 F. 2d 403 (C. A. 3, 1954), decided subsequent to *Alton*. In that case, the plaintiff, a professional singer, filed his petition for divorce about nine weeks after arrival from New York. On the next day he left the Virgin Islands to fulfill professional engagements in Puerto Rico, the United States, and Canada. He returned to the Virgin Islands about seven months later. The record shows that his wife had entered a general appearance but she did not actually contest jurisdiction. The Court of Appeals refers to the fact that the District Judge conducted "a rather searching questioning" of the plaintiff on the issue of domicile[26] and thereupon denied the divorce on the

[25] We are informed that the figures used in Judge Goodrich's opinion were the formal statistics supplied to him by the Clerk of the District Court. The results set forth in Appendix "D" are based upon a study that was made upon the detailed request of counsel. They would not be disclosed . . routine court statistics.

[26] Contrast the Nevada practice. Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 Harv. L. Rev. 443, 462 (1953).

grounds that plaintiff had not proved that he was domiciled in the Islands. The Court of Appeals reversed, holding that domicile had been proved (Maris, Woodbury and Hastie, J. J.). A reading of this case is instructive as to the thin line that divides "domicile" and the lack thereof.

Beyond this, the Divorce Law of the Virgin Islands contains an extraordinary provision authorizing the District Court to require, as a condition of the maintenance of the action, that a plaintiff husband pay to the wife an amount of money necessary to enable her to defend the action.[27] In practice where this provision is invoked by a non-resident defendant, the court requires the husband to pay transportation and hotel expenses, and a preliminary counsel fee. This procedure is often used. A typical order is attached hereto as Appendix "E".

The Court of Appeals recognized that "The statutory presumption in the present case will doubtless eliminate the temptation to . . . perjury" (207 F. 2d at 673), which it said is frequently the basis of proof of domicile in divorce cases brought away from the matrimonial domicile. It nevertheless held that the presumption is forbidden by the due process clause. We do not believe that the Bill of Rights enacts a prohibition against legislative action designed, in the absence of challenge by the Court or a party, to make it unnecessary for lawyers to ask and witnesses to

[27] Section 11 of the divorce law provides: "After the commencement of an action, and before a judgment therein, the court or judge thereof may, in its discretion provide by order as follows: (1) That the husband pay, or secure to be paid, to the Clerk of the Court such an amount of money as may be necessary to enable the wife to prosecute or defend the action, as the case may be; (2) For the care, custody, and maintenance of the minor children of the marriage during the pendency of the action; (3) For the freedom of the wife from the control of the husband during the pendency of the action and the Court may restrain [sic] either or both parties from disposing of the property of either party pending the action." Act of the Legislative Assembly of the Virgin Islands, approved December 29, 1944, as amended by Act, approved May 29, 1953.

answer as to their frequently dubious intent.[28] The presumption will neither increase nor decrease the number of divorces obtained by people who leave their previous homes for the purpose.

In any event, it is clear that the statutory provision in issue, the *prima facie* presumption, fully safeguards the right to contest allegations of domicile; that the presumption is procedural and its force disappears when countervailing evidence is introduced; and that there is full opportunity under Virgin Islands law and actual practice to contest jurisdiction. The presumption will not alter the frequency or infrequency of contest. It is sufficient that it leaves the right and opportunity unimpaired. The presumption accordingly does not violate the due process clause.

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[28] "The discrepancy between the law of the books and the law in action, which we find in so many states, has through its tolerance of promotion of collusive practices and perjury, developed into a serious threat to the morals of the bar and respect for law among the public." Rheinstein, *Trends of Marriage and Divorce Law of Western Countries*, 18 Law and Contemp. Prob. 3, 19 (Winter 1953). "It is not over-healthy to keep in operation any system built on a theory as to controversy, fault, and collusion which the bulk of otherwise decent people who have occasion to deal with it regard it as necessary to cheat. Neither made-to-order evidence nor perjury are useful social products * * *." Llewellyn, *Behind The Law of Divorce*, 33 Col. L. Rev. 249, 281, n. 77 (1933). *Cf.* the remarks of Mr. Justice Frankfurter concerning the M'Naghten rules before the Royal Commission on Capital Punishment, Cmd. 8932, p. 102 (1953): "If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us—they are honoured in the breach and not in the observance—then I think the law serves its best interests by trying to be more honest about it * * *. I am a great believer in being as candid as possible about my institutions."

As to the professional problems which the current state of the law creates for lawyers, see Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 Harv. L. Rev. 443 (1953).

III. THE LEGISLATURE HAS POWER TO BASE DIVORCE JURISDICTION UPON SIX WEEKS' RESIDENCE AND PERSONAL JURSDICTION OF BOTH PARTIES

The second clause of the statute provides that where the plaintiff satisfies the residence requirement and the "defendant has been personally served within the jurisdiction or enters a general appearance in the action, then the Court shall have jurisdiction . . . without further reference to domicile or to the place where the marriage was solemnized or the cause of action arose." This provision, as well as the *prima facie* presumption, is available in this case as a basis of jurisdiction since (1) the defendant entered a general appearance and was represented by counsel and (2) the plaintiff had satisfied the residence requirements of the statute, pp. 3-5, *supra*.

The majority of the Court of Appeals held that this provision of the statute conflicts with the due process clause of the Fifth Amendment and of the Organic Act. Its thesis was that domicile is fundamental to divorce jurisdiction and therefore a due process requirement. Primarily, the court reasoned that, although the issue here was restricted to the power of the divorce state, other jurisdictions would not be required under the full faith and credit clause to recognize a divorce decree granted in the absence of domicile, and that accordingly it would be a violation of due process for the non-domiciliary jurisdiction to enter the decree. In other words, the majority of the court held that in this type of case "due process at home and full faith and credit in another state are correlative." (207 F. 2d at 676).

We believe that the court's decision is incorrect. Preliminarily, we suggest that the due process clause may not be applicable to this case because no person is being deprived of any rights. But fundamentally, we submit that the due process clause does not prevent a legislature from prescribing standards for divorce jurisdiction which do not include proof of domiciliary intent. The traditional elements of domicile are neither a fundamental nor a con-

stitutional requirement for divorce jurisdiction beyond the reach of legislative authority. The due process clause does not require adherence to a formal and frequently perjurious ritual. The applicability of the full faith and credit clause does not determine the incidence of the due process clause; and, in any event, a divorce decree rendered in full compliance with the requirements of a state or territory, based upon the continuous presence of the plaintiff and personal jurisdiction of both parties, would be entitled to the benefits of recognition by other jurisdictions under the full faith and credit clause.

It is important again to emphasize that this case does not present any issue as to extra-territorial recognition. It is here as a result of the refusal of the District Court to exercise jurisdiction in the divorce action on the grounds of the unconstitutionality of the statutory provisions.

A. DUE PROCESS

At the outset, it is necessary to inquire whether any issues under the due process clause are before the Court in this case. No person is being deprived of any rights, procedural or substantive. Plaintiff and defendant are the only "persons" concerned, and neither of them is injured or threatened with injury. The defendant has accepted the jurisdiction of the Virgin Islands court, and has consented to the entry of judgment (R. 6). Clearly, he is not being deprived of life, liberty or property within the meaning of the due process clause. In our opinion, there are no other rights, prerogatives, or values involved in this case which are appropriate for or which justify or demand the protection of the due process clause.

The Court of Appeals, however, considered that the due process clause could be invoked on behalf of the supposed interests of hypothetical and unidentified "domiciliary states", i.e., to prevent a legislature from taking "to itself the readjustment of domestic relations of those domiciled elsewhere" (207 F. 2d at 677). According to the majority this interest of the state in which persons "have their

homes" is "fundamental" and therefore protected by the due process clause—presumably even in a proceeding to which the state is not a party or a participant in any sense.[28a]

We hereinafter discuss the debatable merits of this assumed interest of the "domiciliary state". Our present point, however, is that this "interest" has no place in the present proceeding. If there is a fundamental interest of another jurisdiction which should be protected, this is not the proceeding in which that may be considered.

This is an action for divorce under the Virgin Islands law. It is not an action to assert rights or determine status under the law of any other jurisdiction. No other jurisdiction has intervened in these proceedings. We do not know whether any other jurisdiction objects. We do not know where the parties "make their home." We do not know whether they will remain in the Virgin Islands, as many persons do after divorce regardless of their original intention or lack thereof. We do not know whether, if they leave the Virgin Islands, they will return to their previous home or will move to another state. We do not know whether the jurisdictions in which they reside consider their policy offended by the Virgin Islands divorce, or whether they are entirely agreeable to such divorce.

Even if we assume then that another jurisdiction or other jurisdictions may have a "fundamental" interest in whether Mr. and Mrs. Granville-Smith are divorced, we respectfully suggest that the courts should not in this proceeding postulate such interest and proceed to vindicate it by application of the due process clause. This interest, if it exists, should be considered only in a proceeding in

[28a] The Court of Appeals compared the situation here to an attempt by a state "to confer jurisdiction in matters concerning collision at sea upon a state court, in the absence of dissent by either party" (207 F. 2d at 667). Such an attempt would clearly be beyond the power of the state because the subject matter is confined to the federal courts by Article III of the Federal Constitution. But the analogy is inapplicable here; divorce is clearly within the jurisdiction of the states.

which the putative "domiciliary state" participates. In the present action, only Mr. and Mrs. Granville-Smith are parties, and there is no claim that any rights of either of them are being invaded.

1. The Authority of a State or Territory

Fundamentally, however, it is our position that the second provision of the statute does not offend the due process clause. On numerous occasions, various justices of this Court have recognized the authority of a state, so far as validity within its own borders is concerned, to grant divorces on whatever basis it sees fit, consistent with procedural due process. In *Williams* v. *North Carolina* (I), 317 U. S. 287, at 299, the Court stated:

> "[I]f the Nevada decrees are taken at their full face value . . . they were wholly effective to change in that state the marital status of petitioners . . ."

Mr. Justice Frankfurter concurring in that case, stated:

> "It is indisputable that the Nevada decrees here, like the Connecticut decree in the Haddock case were valid and binding in the state where they were rendered."

Mr. Justice Murphy, concurring for himself, the Chief Justice and Mr. Justice Jackson, in the second *Williams* case, *Williams* v. *North Carolina*, 325 U. S. 226, 239, stated as follows:

> "The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders."

And Justices Black and Douglas, dissenting, in the second *Williams* case, stated specifically (325 U. S. at 274):

> "The jurisdiction of state courts over persons and things within their boundaries has been uniformly acknowledged through the years, without regard to the length of their sojourn or their intention to remain.

> And that jurisdiction has not been thought to be limited by the Federal Constitution."

See also Rutledge, J., dissenting, 325 U. S. at 246.[29]

The statutory provision here is an appropriate exercise of state or territorial power. In actuality, its effect is extremely limited. It is neither drastic nor revolutionary. It represents merely an effort to deal honestly with a problem which has resulted in a great deal of perjury and in debasement of the standards of justice. The provision does nothing more than to eliminate the necessity for "evidence" as to intent to remain in the jurisdiction. It makes it unnecessary for counsel to ask or witnesses to answer the "Nevada" question as to intention to establish "an indefinite permanent residence".[30] It eliminates the practice, in vogue in some jurisdictions, of requiring the plaintiff to buy a fishing license even if he does not wish to fish; a driver's license, even if he does not propose to drive; and a library card even if he proposes not to read.

It seems, however, to be the position of the court below that these petty deceits, or at least the affirmation by the plaintiff of intention to remain, are a constitutional requirement which makes the difference between validity of the resulting decree at home and recognition abroad on the one hand, and invalidity everywhere on the other.

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[29] "We have searched the numerous cases decided by the Supreme Court of the United States on the subject of migratory divorce for a definitive holding as to the judicial status of such divorce in the state that decreed it. It appears to be assumed that the decree is valid and binding in the state where it is rendered * * *." *Sutton* v. *Leib*, 188 F. 2d 766, 768 (C.A. 7, 1951), reversed on other grounds, 342 U.S. 402.

[30] See Powell, *And Repent at Leisure*, 58 Harv. L. Rev. 930, 945, n. 36 (1945):

> "Q. What was your object and intention in coming here at that time?
>
> A. To establish a residence.
>
> Q. And did you establish a residence?
>
> A. Yes.
>
> Q. And that residence was an indefinite permanent residence?
>
> A. Yes."

The court below recognized that in certain states applying the domicile test "The court's finding of domicile usually is contrary to the fact and frequently is based upon evasive or even perjured testimony" (207 F. 2d at 673). In 1935 members of the Nevada Bar said that "Today divorce may be had in Nevada by mutual consent and with the absolute minimum of strain on anything but the conscience." Ingram and Ballard, *The Business of Migratory Divorce in Nevada*, 2 Law & Contemp. Prob. 302, 305 (1935). And this was all accomplished by a "convention in perjury". Id. at 306. The situation is unchanged. Yet the court below holds in effect that the Constitution requires such a convention in perjury and condemns an attempt by an insular legislature to eliminate the prevarication and evasion. Stripped to its essence, the question is whether legislatures have the power to act in the interests of the integrity of their legal processes and in the light of reality, or whether they are bound unalterably to require an incantation by the plaintiff, however empty, of the formula of domicile.

In the Virgin Islands there is no tradition of these deceits. After the decision in *Burch* v. *Burch*, *supra*, which construed the Virgin Islands law prior to the amendments in issue to require domicile as a basis of divorce jurisdiction, the Bar might have recommended and the legislature might have decided to respond by adopting the ritual generally used in Nevada, Arkansas, Idaho, Florida, and other states. They did not so decide. On the contrary, the legislature adopted the provisions at issue here to make this deceit unnecessary. We do not believe that its decision conflicts with the due process clause, with "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105.

2. The History of Domicile

The concept of domicile in connection with divorce is of relatively recent origin. There is general agreement that the doctrine was introduced by Story in 1834 in his *Commentaries on the Conflict of Laws*. Cook, *The Logical and Legal Basis of the Conflict of Laws*, c. XVIII (1942); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193, 229 (1951).

It is interesting that even Story's statement which gave currency to the domiciliary basis of divorce jurisdiction, did not purport to describe it as essential or exclusive. Story's remark related to a choice of law and not a jurisdictional problem, that is, to the power of the court of domicile to apply its own law rather than that of the place of marriage or where the offense was committed. Story wrote:

> "Upon the whole the doctrine now firmly established in America upon the subject of divorce is that the law of the place of the actual bona fide domicile of the parties gives jurisdiction to the proper courts to decree divorce for any cause allowed by the local law, *without reference to the law of the place of the original marriage, or to the place where the offense for which the divorce allowed was committed.*" Story, *op. cit. supra*, Section 230 (a) (emphasis supplied)

In 1823, Chancellor Kent described the divorce policies of the states as "exceedingly various." Kent, *Commentaries on American Law* 105 (1823). Kent expressly referred to divorces obtained in states other than those where the husband and wife "were married, and resided." His remarks are relevant to the present problem:

> "There can be no doubt that a divorce of the parties who are married and regularly domiciled at the time in the state where the court pronounced the divorce, would be valid everywhere. The difficulty is, when the husband and wife were married, and resided in a state where divorces are not permitted at all, by the policy

of its law, or not permitted to the extent and for the causes allowed to operate in other states; and that, where one of them, remove into another state for the sole and express purpose of procuring a divorce, and, having obtained it, return to their native state, and contract other matrimonial ties.

"According to the doctrine of the decisions in the federal courts, it may be contended that a divorce in one state, judicially conducted and declared and procured under circumstances which gave the court full jurisdiction of the cause and of the parties, and sufficient to render the divorce valid and binding there, would be good and binding in every other state and yet it is evident that the domestic policy of one state in this very interesting subject of divorce may in this way be exposed to be greatly disturbed by a different policy in another state. It may be proper in this work to leave the question as I find it; but if such a divorce will operate and conclude the question in every state, we are at least relieved from that changing and distressing collision which exists between judicatures of England and Scotland on this subject; and the appeal must be made to the mutual comity, moderation, and forbearance of the legislatures of the several states in their respective regulations on the subject of divorce." Kent, *op. cit. supra*, at 107-110.

In the few early records that are available as to the exercise of divorce jurisdiction in Colonial America, we have found a Connecticut case in which the Superior Court in 1773 granted a divorce althought the court felt that neither party was domiciled in Connecticut. The complete report of the court's proceedings is as follows:

"Rawson (v. .....): Petition for Divorce. Cause Savitia [probably saevititia, i.e., cruelty] and for Desertion. She and her Husband belonged to Yarmouth in Massachusetts Bay. (I)n consequence of their contention and separation she came into this Colony two years ago and means to continue here as her Husband refuses to let her come home or to live with him. The Court had some doubt on the score of her not being an Inhabitant in this Colony (as she could not be

> because her Husband remained at Yarmouth), but the Husband consenting, by Letter, Petition granted." The American Historical Association, *The Superior Court Diary of William Samuel Johnson*, 1772-1773, p. 231 (1942).

It is clear that the doctrine of domicile in divorce jurisdictions was not a part of the common law at the time of the American Revolution or when the Constitution was adopted.[31]

The doctrine was not part of the common law of England in 1787. Divorce *a vinculo matrimonii* was granted in England only by Act of Parliament. The English ecclesiastical courts could grant limited relief, presumably to any member of the church, wherever he might make his home.[32] It was not until 1857, however, that the common law courts in England were given authority in divorce cases. See 20 and 21 Vict., c. 85.

Indeed, there seems to be general agreement that the doctrine of domicile was not firmly established in England until 1895 in *Le Mesurier* v. *Le Mesurier* (1895) A.C. 517 (P. C.), which also related to extra-territorial validity of divorce decrees. (See p. 36, *infra*, as to the recent legislative repeal of the holding in Le Mesurier).[33]

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[31] "The early New York cases * * * would seem to indicate that jurisdiction over the subject matter of divorce might exist in some other state than that of the domicil." Howe, *The Recognition of Foreign Divorce Decrees in New York State*, 40 Col. L. Rev. 373, 386 (1940).

[32] Radin has suggested that the doctrine of domicile is traceable to the fact that the ecclesiatical courts granted divorces only to church members. Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 Ill. L. Rev. 1, 31 (1944). See Madden, *Personal and Domestic Relations* 256-261 (1931).

[33] The dissenting opinion below (per Hastie, J.) sums up the situation as follows (207 F. 2d at 681):

> "Thus, we seem to have the curious chronology of the American courts adopting a rule of practice in the first half of the nineteenth century under the influence of the creative scholarship of a distinguished writer, the British courts adopt-

3. The Concept of Domicile

It seems reasonably clear that domicile is a troublesome concept which should be resorted to only where policy allows no alternative or statesmanship can suggest no substitute. Justice Rutledge referred to "the ways the Court has travelled in a domiciliary wilderness . . ." *Williams* v. *North Carolina II*, 325 U. S. 226, 244 (dissent). In *Texas* v. *Florida*, 306 U. S. 398, 429, members of this Court said that domicile "tends to be a less and less useful fiction." (Opinion of Frankfurter and Black, J.J.).

Certainly a doctrine of this nature does not deserve to be enshrined as a constitutional requirement. On the contrary, every encouragement should be given to its elimination by legislative action which, as is the case here, takes full account of the substantial values involved.

4. Current Departures From Domiciliary Concepts

A decision that domicile is a constitutional imperative would frustrate development and experimentation in the highly involved and dynamic field of divorce law. It is significant that legislation enacted in the British Commonwealth in recent years has provided for divorce jurisdiction in certain circumstances on the basis of residence rather than domicile. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 Harv. L. Rev. 193, 197 (1951). The *Indian and Colonial Divorce Jurisdiction Act*, 1926,[34] according to Dean Griswold "clearly recognized that a divorce might be granted by the courts of a state in which the parties were not domiciled." Griswold, *op. cit. supra*, at 197. As a consequence of subsequent extensions of the Act, "the result of *LeMesurier* v. *LeMesurier* itself was expressly overturned."

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ing this doctrine in the latter half of the nineteenth century, and now in mid-twentieth century, American judges saying that the doctrine is one of those fundamental ideas which must be read into the original provisions of our Constitution."

[34] 16 and 17 Geo. 5, c. 40.

Ibid. Other legislation has been enacted in the British Commonwealth which also clearly departs from the theory that a divorce may be granted only by the courts of the domicile. Under the Matrimonial Causes Act, 1950,[35] a wife may obtain a divorce in case of desertion or deportation of her husband if she is resident in England and has been residing there for three years preceding the commencement of the proceedings.[36] Dean Griswold reports that in England the wife's domicile remains that of her husband but the effect of the statutes is that "English courts may now grant divorces in many cases where the parties are not domiciled in England and indeed, where the defendant has never been domiciled in England". Griswold, *Id.* at 200; see also Garland, *Domicile and Divorce*, 103 Law Journal 602 (1953).

These changes in English law have come about in response to changing conditions and the needs of the people. Wartime population shifts accelerated the development. Whatever one's views may be as to the desirability of the domiciliary rule, the English developments indicate that it would be extremely unwise to elevate domicile to constitutional status, and thereby foreclose the possibility of legislative adjustment to changing needs.

Illustrative of such adjustment is a Kansas statute providing that a plaintiff in a divorce action "must have been an actual resident in good faith of the state for one year, . . . provided that any person who has been a resident of any U. S. Army post or military reservation within the State of Kansas for one year next preceding the filing of the petition may bring an action for divorce in any county adjacent to said United States Army Post or military reservation." Decisions prior to this enactment had established that soldiers resident on an Army post were not thereby "domiciled" for divorce purposes. In

[35] 14 Geo. 6, c. 25 § 18.

[36] This does not appiy if the husband is domiciled in any part of the United Kingdom, or the Channel Islands, or the Isle of Man. Griswold, *op. cit. supra*, at 199.

Craig v. *Craig*, 143 Kan. 624, 56 P. 2d 464 (1936), the Supreme Court of Kansas held that the foregoing statute required the court to exercise jurisdiction in a divorce action brought against a soldier despite the absence of domicile. No due process issue was raised. The court pointed out that the legislature might have found it inadvisable to remit soldiers to their domicile of origin in order to seek a remedy as to their marital status. We submit that it would be highly undesirable to hold that the Federal Constitution prohibits states from making practical provisions of the sort that the Kansas statute exemplifies.[37]

A holding that domicile is a constitutional requirement to divorce jurisdiction would also strike down a New York statute authorizing the Courts of that state to grant a divorce "where the parties were married within this state." N.Y. Civ. Pr. Act § 1147. It has recently been held in construing this provision that neither domicile nor residence of either party is necessary, and that "marriage within the state is a fact sufficient of itself to enable a state to confer upon its courts jurisdiction of an action to dissolve that marriage." *David-Zieseniss* v. *Zieseniss*, 129 N.Y.S. 2d 649, 205 Misc. 836 (Sup. Ct. 1954), noted 54 *Col. L. Rev.* 1165 (1954). In response to the contention that domicile was essential to divorce jurisdiction, the Court said:

> "To assert generally and broadly that jurisdiction of divorce depends upon or is founded upon domicile in such a way as to imply that jurisdiction cannot be founded upon any other fact, is simply to say something which is palpably contrary to the statutory law of New York as it has existed for over ninety years, and contrary, also, to Gould v. Gould, 235 N.Y. 14, 138 N.E. 490, in which our Court of Appeals went so

[37] New Mexico dealt with the same problem by creating a presumption of domicile for servicemen based upon one years presence at a military base in New Mexico. *Crownover* v. *Crownover*, 274 P. 2d 127 (N.M. 1954).

far as to recognize as valid here a foreign decree of divorce rendered in a place (France) where it said neither spouse was domiciled."[38] 129 N.Y.S. 2d at 653.

If the domicile concept is incorporated into the due process clause, Congress could not adopt, if it should wish to do so, a law allowing government employees resident in the District of Columbia for a long period, but domiciled elsewhere, to use its courts for divorce purposes.[39] It would also limit the Congress in endeavoring to aid the states and the courts in divorce administration by use of its power to legislate under the full faith and credit clause. A bill for this purpose has twice passed the Senate. See 99 Cong. Rec. 4575 (1953); S. 39, 83d Cong., 1st Sess., and S. Rep. 113. That bill is based specifically on the theory that recognition may be compelled of a decree of divorce on the basis of either domicile or personal jurisdiction of parties. The bill provides that a decree "must" be given full faith and credit in every other state as a dissolution of a marriage provided "the state wherein the decree was rendered was the last state wherein the spouses were domiciled together as husband and wife, *or the defendant in the proceeding for divorce was personally subject to the jurisdiction of the state wherein the decree was rendered or appeared generally in the proceedings therefor.*" (Emphasis supplied). If it is unconstitutional to provide for the exercise of divorce jurisdiction without domicile, the italicized portion of this bill is nugatory, and any future effort by the Congress to use its powers to ameliorate the difficulties as to divorce jurisdiction involved in our federal system, would be drastically handicapped. *Cf.* Lorenzen's suggestion for

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[38] Accord: *Oettgen* v. *Oettgen*, 196 Misc. 937, 94 N.Y.S. 2d 168 (1949); *Schildkraut* v. *Schildkraut*, 226 App. Div. 747, 233 N.Y.S. 585 (1929).

[39] *Cf.* the action taken by the Congress to abandon exclusive use of domicile for tax purposes and to substitute a scheme of taxing domiciliaries and non-domiciliaries who maintain "a place of abode" for a specified period. D. of C. Code § 47-1551c (s) (1951 ed.). See *District of Columbia* v. *Murphy*, 314 U.S. 441.

a fixed period of residence, *Haddock* v. *Haddock Overruled*, 52 Yale L. J. 341, 352 (1943); See also, Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 Col. L. Rev. 54 (Jan. 1954).

5. The Supposed Interests of the "Domiciliary" State

We also submit that the desirability of a rule in this country that the domicile of one spouse is necessary for divorce jurisdiction is by no means so clear, nor is its importance of such magnitude, as to justify its being regarded as a constitutional requirement which the states and territories cannot alter. The usual arguments as to the paramount interest of the domiciliary state in the regulation and dissolution of marriage are highly debatable. Some of the offsetting considerations are these: (1) It is by no means clear that the divorcing spouse always or in most instances returns to the state in which that spouse resided while married. Divorces often lead to remarriage; spouses, particularly wives, after divorce often go elsewhere. (2) In our complex and mobile society, many persons have important connections with more than one state; for example they may have their homes in Connecticut and work in New York; they may move from state to state; they may have homes in more than one state. (3) "When we recall the extremely technical meaning of the word 'domicile' in Anglo-American law, we see at once that a person may be domiciled in a given state without being in any realistic sense a member of that community; he may have no home there and have no intention of ever returning there. If, therefore, the rule in question is to be based upon social reality, mere technical domicile should be insufficient; actual residence in the place as one's home should be necessary." Cook, *The Logical and Legal Basis of the Conflict of Laws* 465 (1942). (4) The major values involved in matrimonial disruptions are not technical, political or geographical; they are not the theoretical concern of a body politic. They are highly personal, such as

cultural and moral factors, the welfare of children, the opinion of others, business matters, and the like.

In fact, the real interest of the "domiciliary" state has been so reduced by our changing society that it is of little or no importance. This has been reflected by developments in the law. We discarded the fundamental principle upon which solicitude for the interests of the domiciliary state in the marital status of its citizens was based, when, in response to the realities of modern life and in accordance with developments of legal and social thinking, we abandoned the concept of "matrimonial domicile"—that husband and wife have a single home jurisdiction which is the "situs" of the marriage. Each spouse may, under our law, have a separate and different domicile, and the jurisdiction in which either is domiciled may grant a divorce, valid everywhere. *Williams v. North Carolina I*, 317 U.S. 287. The marital policies of the state in which one spouse is domiciled may differ radically from the policies of the state in which the other spouse resides. If the husband is domiciled in New York and the wife in Illinois, it is somewhat strained, we suggest, to urge that there is a domiciliary state whose interests in the marriage are so basic as to justify a constitutional monopoly.[40] The court granting an *ex parte* divorce may take account of the marital policies of *that* state of domicile, but it does not take account of the policies of the state in which the other spouse is domiciled. Nor does it assure that the court will have an opportunity to consider the interests of both parties. It would be curious to require compulsory recognition of divorce decrees in such a case despite the absence of personal jurisdiction over the defendant while full faith and credit were withheld where both parties were before the court and the court could consider their interests and evaluate their contentions.

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[40] See generally, *Divorce Without Domicile: Two Views on the Virgin Islands Statute*, 39 Cornell L. Q. 275 (1954).

The Court of Appeals reasoned that "adherence to the domiciliary requirement is necessary if our states are really to have control over the domestic relations of their citizens" (207 F. 2d at 676). But states other than the jurisdiction in which the parties are domiciled may and often do effect changes in their domestic relations. For example, domiciliaries of State A may be married in State B, in deliberate disregard of the laws and policies of A as to such important matters as age, prohibition against remarriage after divorce, degrees of kinship, race, and the like.[41] It has been frequently held that the state where the marriage was celebrated, though not the domicile of either party at the time of suit, may enter decrees annulling a marriage if both parties are personally subject to the jurisdiction of the court. *Feigenbaum* v. *Feigenbaum*, 210 Ark. 186, 194 S. W. 2d 1012 (1946); *Titus* v. *Titus*, 115 W. Va. 229, 174 S. E. 875 (1934); *Sawyer* v. *Slack*, 196 N. C. 697, 146 S. E. 864 (1929); *McDade* v. *McDade*, 16 S. W. 2d 304 (Tex. Civ. App. 1929).[42]

Moreover, the decisions of this court upon which we comment hereinafter have also vastly reduced the importance of domicile. See *May* v. *Anderson*, 345 U.S. 528, 538 (Jackson, J., dissenting). Certainly, the doctrine is not entitled to the status of an ineluctable constitutional requirement restricting state power.

B. FULL FAITH AND CREDIT

1. This case does not present any question concerning the extra-territorial effect of a divorce decree granted in the Virgin Islands pursuant to the statute in issue. The Court of Appeals, we believe, was clearly wrong in con-

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[41] Such marriages are valid in the state where celebrated, in other jurisdictions, and more frequently than not in the domiciliary state. *Loughran* v. *Loughran*, 292 U. S. 216, 223; *McDonald* v. *McDonald*, 6 Cal. 2d 457, 58 P. 2d 163 (1936); see Goodrich, Conflict of Laws § 117 (3d ed., 1949).

[42] Contra: *Turner* v. *Turner*, 85 N.H. 249, 157 A. 532 (1931); *Antoine* v. *Antoine*, 132 Miss. 442, 96 So. 305 (1923).

cluding that unless a decree is entitled to full faith and credit it conflicts with the due process clause. In the various cases in which this Court has refused to compel full faith and credit of divorce decrees, it has never held that invalidity in the granting state under the due process clause followed from refusal to extend full faith and credit.[43] Of course, a decree granted by a court which lacks jurisdiction to render a judgment valid by tests of due process, is invalid at home and may not be enforceable in other states. *Old Wayne Mutual Life Ass'n.* v. *McDonough*, 204 U.S. 8. But the converse is not true. A statute or decree may be valid in the enacting state even though it is not entitled to compulsory recognition elsewhere. *Pink* v. *A. A. A. Highway*, 314 U. S. 201.[44] In his oft-quoted dissenting opinion in *Yarborough* v. *Yarborough*, 290 U.S. 202, 214-215, Mr. Justice Stone stated: "... this Court has often recognized, there are many judgments which need not be given the same force and effect abroad which they may have at home, and there are some to which the full faith and credit clause gives no force elsewhere."[45]

There is, of course, no reason why states may not "extend recognition when they could not constitutionally be required to do so." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Col. L. Rev. 1, 30 (1945). The New York Court of Appeals recognized the validity of a French divorce, although the parties were domiciled in New York at the time of the French decree. *Gould* v. *Gould*, 235 N.Y. 14, 138 N. E. 490 (1923). By the

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[43] See Powell, *And Repent at Leisure*, 58 Harv. L. Rev. 930, 936 (1945); Lorenzen, *Haddock* v. *Haddock Overruled*, 52 Yale L.J. 341, 349, n. 34 (1943); fn. 29, *supra*.

[44] Mr. Justice Frankfurter has pointed out that "A divorce may satisfy due process requirements, and be valid where rendered, and still lack the jurisdictional requisites for full faith and credit to be mandatory." *Sherrer* v. *Sherrer*, 334 U.S. 343, 369, fn. 16 (dissenting opinion).

[45] See Baade and Williams, *Constitutional Checks on Collusive Invasion of Jurisdiction in Matrimonial Actions*, 4 Duke Bar Journal 55, 58-64 (1954).

same token, a state may, if it chooses, give full effect to Virgin Islands divorce decrees even if it is not compelled to do so by reason of Art. IV, Section I of the Constitution. See *May* v. *Anderson*, 345 U.S. 528, 535 (Frankfurter, J., concurring).

The lower court's decision ascribes an unprecedented function to the full faith and credit clause. That clause is a vital instrument of our federal system, designed in appropriate circumstances to compel recognition throughout the union of the acts of any part of the union. See *Johnson* v. *Muelberger*, 340 U.S. 581, 584. It is not an instrument for federal dictation to the states and territories of what they may or may not do within their own borders, except where the recognition or enforcement of the "public acts, records, or judicial proceedings" of another state is involved. The full faith and credit clause may not properly be invoked to impose uniformity of policy upon the several states in derogation of the Tenth Amendment which reserves jurisdiction over marriage and divorce to the states. *State of Ohio ex rel Popovici* v. *Agler*, 280 U.S. 379, 383. Our federal system is designed to permit and even to promote diversity of policy within the limits of specific constitutional prohibitions. To use the full faith and credit clause to invalidate a state law in the circumstances of this case is, we submit, to expand federal jurisdiction far beyond the limits of our constitutional system.

The decision below, however, uses the full faith and credit clause in this novel fashion. Because it assumes that a decree under the Virgin Islands provisions would not be entitled to compulsory recognition, it argues that the decree would therefore be invalid in the granting jurisdiction. It reaches this result by equating due process and full faith and credit—a process which converts the full faith and credit clause into a constitutional limitation upon the power of a state to legislate within its own borders independently of any conflict with the laws of other states.

We submit that this result is not permissible, and that the incidence of the full faith and credit clause is irrelevant to this proceeding which concerns only the validity of the statutory provision within the Virgin Islands.

2. However, we submit that it is incorrect to assume that a decree of divorce entered under this provision of the statute would not be entitled to full faith and credit. It will be remembered that the provision is available after proof of six weeks' residence and only if the defendant is personally served within the jurisdiction or enters a general appearance. Then and only then does the statute provide for jurisdiction "without further reference to domicile," *i.e.*, without proof of domiciliary intent.

This Court has held that in circumstances where both parties are personally before the court, a divorce decree cannot be collaterally attacked in the domiciliary state, but must be recognized under the full faith and credit clause as between the parties and those in privity with them. *Sherrer* v. *Sherrer*, 334 U.S. 343; *Coe* v. *Coe*, 334 U.S. 378. This is true even though the "undisputed facts" show that the jurisdictional requirements of the granting state were not fulfilled. *Johnson* v. *Muelberger*, 340 U.S. 581.

In the foregoing cases the divorce decree was granted under conventional statutes requiring proof of domiciliary intent as well as a period of residence in order to obtain jurisdiction. Their theory appears to be that since the defendant had an opportunity in the divorce proceedings to contest domicile, and since he could not collaterally attack the adjudication in the granting state, the "domiciliary state" is prevented by the full faith and credit clause from permitting him to attack the decree in a subsequent proceeding. In the present case, the defendant voluntarily entered a general appearance in the action. He has not objected to the plaintiff's claim of jurisdiction. He has not complained of the lack of "domicile." He is in substance in the same position as the defendants in the cases cited above. The only difference is that in the

foregoing cases, the defendants had a theoretical right to direct an attack upon the plaintiff's alleged domicile. We cannot believe that the presence or absence of this theoretical right should or will determine whether full faith and credit must be accorded to a divorce decree.

The remaining question is whether a divorce decree under the Virgin Islands provision would be entitled to compulsory recognition as against the "domiciliary state." In *Williams II* it was held that the state could maintain a bigamy prosecution against persons who had remarried after an *ex parte* divorce in Nevada obtained without satisfying the requirements of Nevada law for domicile. We do not know whether *Williams II* is restricted to *ex parte* divorce situations of the type at issue in that case. We do not know whether, for example, in *Johnson* v. *Muelberger*, *supra*, the Johnsons could have been prosecuted for bigamy by New York State on account of remarriage after the Florida divorce in which both appeared.

We believe, however, that the situation where both parties are before the court is fundamentally different from that presented in *Williams II*. In the latter, involving an *ex parte* decree, elements of fraud upon the other spouse and the lack of the safeguards afforded by personal jurisdiction over both parties, are powerful factors of importance to the substantial values concerned. It is therefore entirely possible that this court would not extend *Williams II* to a situation in which both parties appeared and were personally subject to the jurisdiction of the divorce court, but would hold that in the latter situation, the divorce decree is entitled to full faith and credit, not only as against the parties and those in privity with them, but also as against the state.

If this is so, we suggest that a decree granted under the second provision of the Virgin Islands law would also bar a subseqent attack by another state, as well as by either party. Indeed, the Virgin Islands case would present a more appealing situation for the complete application of full faith and credit. In that case, the parties would have

fully and honestly complied with the jurisdictional requirements of the granting state. The elements of fraud or deception involved in obtaining jurisdiction under domicile statutes would not be present.

In terms of policy, then, and of the substantial values involved, it is our view that full faith and credit for all purposes should be accorded to decrees under the Virgin Islands provisions.

The recent decisions of this Court in this field have demonstrated a determination to deal with the problem in terms of the substantial values involved. "Domicile" is no longer a conceptual key with which the courts must seek to unlock all problems however badly the key may fit. The presence of domicile does not assure the out-of-state recognition of such incidents of divorce as alimony, property, or custody of children. *Estin* v. *Estin*, 334 U.S. 541; *May* v. *Anderson*, 345 U.S. 528. The absence of domicile does not mean that other states may refuse recognition to the divorce decree in litigation between the parties and those in privity with them. *Johnson* v. *Muelberger*, *supra*. The fact that divorce proceedings where both parties are before the court avoid fraud and imposition and make possible recognition of the real values at stake, has led to full enforcement of decrees therein; and the hardship and injustice that would result from a denial of full effect to such divorces have contributed to the same result. On the other hand, the unfairness, the danger and destructiveness of *ex parte* divorces[46] have induced, we think, a tendency to narrow their effectiveness as to property rights, children, and the dissolution of the marital status.

It is interesting to note that the English courts, faced with a problem, similar to our federal problem, of the recognition of divorce decrees among members of the Commonwealth, have reached the conclusion that extra-territorial recognition of divorce decrees must be accorded in

[46] See Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 Col. L. Rev. 54-59 (1954).

certain circumstances even in the absence of domicile. In the recent case of *Travers* v. *Holley*, [1953] 3 Weekly L. Rep. 507, [1953] 2 All. E. R. 794, the Court of Appeals considered the effect of a decree granted under the Matrimonial Causes Act, 1950, where jurisdiction was based solely upon the residence of the wife, in the absence of domicile under British law. It held that a New South Wales decree was entitled to full recognition in England. The basis of its decision was that the courts of England would entertain jurisdiction under similar circumstances, but the case holds that domicile is not necessary for extra-territorial effectiveness. See Griswold, *The Reciprocal Recognition of Divorce Decrees*, 67 Harv. L. Rev. 823 (1954).

Judged by the standards of realistic regard for the real values involved, the second provision of the Virgin Island law should be held to be entitled to full faith and credit. The provision requires a period of residence sufficient to establish a reasonable connection between the jurisdiction and the parties. It does not attempt to make divorce available upon a casual or transitory connection between the territory and the parties. It requires the essential safeguard to justice that both parties be before the court. It is not available in an *ex parte* proceeding.

The statute will not lead to a multiplication of undesirable divorce practices, but will open the way to improvements in a number of respects. It will encourage the restriction of divorce jurisdiction to situations in which both parties are before the court, and may thereby induce a substantial decline in *ex parte* proceedings. It will make available in cases where both parties appear, and not in *ex parte* proceedings, a jurisdictional basis free from the uncertainties and the invitation to perjury that are involved in many current proceedings.

The essential basis of the statute is the requirement of six weeks' continuous presence in the district as well as general jurisdiction of both parties. This period is identical with that previously required in the Virgin Islands as well as in a number of states where juris-

diction is based upon domicile (see footnote 23, *supra*). It is a period of time sufficient to establish a reasonable relationship between the jurisdiction and the parties, which justifies the application of the jurisdiction's laws and judicial system to the adjudication of the plaintiff's marital status, especially since the defendant must also be before the court. It is a period of residence also adequate to assure that the institution of the action for divorce is the product of deliberation, and to serve as advance notice that the prospective plaintiff may, if the defendant appears or is personally served, invoke the processes of its courts for proceedings relating to the marital status.

There is no reason to anticipate that efforts will be made to lower the residence requirements below six weeks. Legislative policy as well as economic factors probably would prohibit the reduction of that period. Indeed, if such a temptation existed it would be more likely to be effective if the concept of domicile were retained, because domicile can be acquired in the twinkling of an eye, and the flicker of a thought—without any prior period of residence.[47]

The Virgin Islands provision will not impair the rights or interests of "domiciliary" states, assuming that these states have substantial interests (see discussion, p. 49, *supra*). The provision does not reduce the required period of residence. Insistence upon "proof of domicile" in Nevada, the Virgin Islands, or elsewhere does not change the realities of the situation—that persons go to these jurisdictions, that they establish "domicile" there in fact or fiction after six weeks' presence, and that they may subsequently return to their home or go elsewhere. "Proof of

[47] The Alabama Supreme Court recently stated in construing a domicile statute: "No particular or specific period of residence in this state [Alabama] is required of a complainant in a proceeding for divorce where the respondent is a non-resident when the court has jurisdiction of both parties to the cause of action, the only jurisdictional requirement being that the complainant be domiciled in this state so as to confer upon the court jurisdiction of the res." *Levy* v. *Levy*, 256 Ala. 629, 56 So. 2d 344 (1952).

domicile" does not satisfy any interests of our society. At best, it merely vindicates a text-book concept which has created much confusion and caused considerable hardship. At worst, it involves the practice of sham and deception which is damaging to our institutions, and infects the lives of divorced people and their children with needless peril and uncertainty.

The Virgin Islands law eliminates the "evasions and perjuries" incident to an insistence upon proof of domiciliary intent. It opens the way for lawyers honorably and confidently to represent clients who are involved in hopeless marital difficulties. See Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 Harv. L. Rev. 443, 463-464 (1953). It opens the door to the elimination of sham and deceit in an area of the law which touches the lives of thousands of citizens. We cannot believe, as the lower court holds, that the Bill of Rights is an insuperable bar to legislative amelioration of these conditions.

We respectfully submit, therefore, that the statutory provision under consideration is valid regardless of the application of the full faith and credit clause; and that, in any event, a decree entered pursuant to the provision would be entitled to full faith and credit.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below should be reversed.

Respectfully submitted,

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December 15, 1954

APPENDIX A

Divorces Granted in the Virgin Islands
St. Thomas and St. Croix

Year	St. Thomas	St. Croix	Total
1940	16	18	34
1941	28	9	37
1942	34	15	49
1943	63	13	76
1944	45	18	63
1945	38	14	52
1946	64	26	90
1947	104	20	124
1948	132	11	143
1949	160	21	181
1950	244	27	271
1951	284	32	316
1952	310	33	343
1953	215	21	236

APPENDIX B

BILL NO. 54

THE 17TH LEGISLATIVE ASSEMBLY OF THE VIRGIN ISLANDS OF THE UNITED STATES 1953, SECOND SESSION

An Act to amend "Law Concerning Actions to Declare Void or Dissolve the Marriage Contract, and for other purposes" approved December 29, 1944.

Be it enacted by the Legislative Assembly of the Virgin Islands in session assembled:

That Sections 8 and 9 of the "Law Concerning Actions to Declare Void or Dissolved the Marriage Contract, and for Other Purposes" approved by the Governor December 29, 1944, be and the same are hereby amended to read as follows:

"Section 8. When a marriage has been solemnized in the district an action may be maintained to declare it void if the plaintiff is physically present in the district at the commencement of the action. If the marriage has not been solemnized in the district, such action can only be maintained when the plaintiff has

been physically present in the district for six weeks prior to the commencement of the action.

"Section 9. In an action for the dissolution of the marriage contract or for a legal separation the plaintiff therein must be physically present in the district at the commencement of the action and for six weeks prior thereto, which physical presence shall be sufficient to give the Court jurisdiction without regard to the place where the marriage was solemnized or the cause of action arose."

PROPOSED BY
COMMITTEE OF THE WHOLE

APPENDIX C

GOVERNMENT HOUSE

Charlotte Amalie
St. Thomas
Virgin Islands of the United States

April 22, 1953

The Honorable
The Chairman of the Legislative Assembly
Christiansted,
St. Croix, Virgin Islands

My dear Mr. Chairman:

I regret that I must return herewith, without executive approval, Bill No. 54 of the Seventeenth Legislative Assembly of the Virgin Islands of the United States, Second Session, 1953, An Act to Amend "Law Concerning Actions to Declare Void or Dissolve the Marriage Contract, and for other Purposes," approved December 29, 1944, passed by the Legislative Assembly of the Virgin Islands on March 27, 1953, and presented to me on April 15, 1953.

This bill purports to amend the divorce law of the Virgin Islands by providing that six weeks sojourn or physical presence in the Virgin Islands shall be equivalent to "domicile" for divorce purposes. Its enactment followed a decision of the District Court of the Virgin Islands to withhold any further divorce decrees, under the local divorce law, in cases where the plaintiff is not a bona fide resident of the Virgin Islands, in accordance with an opinion of

the United States Court of Appeals for the Third Circuit rendered on April 16, 1952.

As I stated on March 31, 1953, it is my opinion that the accompanying Bill, as passed by the Legislative Assembly does not meet the legal objections raised by the opinion of the United States Circuit Court of Appeals for the Third Circuit although it does seem to dispose of certain ethical objections. Having given due weight to all the legal, all the ethical, all the moral, and all the economic factors involved, I am still of the opinion that this Bill should not be allowed to become law. I may add that this opinion is now shared by a majority—if not all—of the members of the Bar Association of the Virgin Islands.

It has been suggested that the enactment of a new amendment to the divorce law of the Virgin Islands should be made to provide that residence of the plaintiff in the Virgin Islands at the time of the filing of the complaint and continuously for six weeks immediately preceding the filing of the complaint would be sufficient to give the District Court jurisdiction to grant divorce in those cases only where the defendant is personally served within the district or enters a general appearance in the action. My objection to the earlier amendment was based principally on the granting of divorce decrees upon complaint of a plaintiff after six weeks residence without the appearance of the defendant in the action or without a personal service of the complaint upon the defendant. If legislation is adopted eliminating this objection, that is, providing that six weeks residence would be sufficient to grant the court jurisdiction when complaint is personally served upon the defendant in the district or when the defendant enters a general appearance in the action, it is my opinion that the moral objection shall have disappeared.

Accordingly, I have no recourse but to veto, which I hereby do, Bill No. 54 which is returned herewith to the Legislative Assembly. If the Legislative Assembly of the Virgin Islands in its wisdom should amend the divorce law of the Virgin Islands, substantially as suggested above, I shall allow such amendment to become law.

Sincerely,

MORRIS F. DE CASTRO
Governor.

APPENDIX D

I, GEORGE A. MENA, Clerk of the District Court of the Virgin Islands, DO HEREBY CERTIFY that a detailed survey of the records of the District Court of the Virgin Islands for the Municipality of St. Thomas and St. John, at Charlotte Amalie, shows the following facts:

Divorce Cases Concluded in 1952	310
Cases in which Answers were filed and General Appearances entered	257
Cases in which Answer was filed but no Appearance	1
Cases in which Special Appearances or the Equivalent were made to contest Jurisdiction*	4
Cases discontinued**	13
Cases in which No Answer filed and no Appearance	31
Cases in which Contest resulted in trial of issues as to Jurisdiction and Merits in which the parties appeared as adversaries***	2
Cases in which Cross-bill filed	2
Total	310

* Two were by "answer" to the jurisdictional allegations, reciting special appearance; one by motion; and one by letter.

** Two discontinued after hearing; 7 before Answer; 4 after Answer. In some of these discontinuance followed the raising of jurisdictional issues by informal communication.

*** 1. In Civil 67-1952 defendant appeared in person and by attorney, filed answer and cross complaint. Trial by Court and decree, entered.

2. In Civil 318-1952, defendant filed "Answer and Waiver", and appeared and testified at trial by Court. Decree entered.

Dated, March 24, 1954.

GEORGE A. MENA
Clerk of the District Court
of the Virgin Islands,
Charlotte Amalie, V. I.

APPENDIX E

In The

District Court of the Virgin Islands

Division of St. Thomas and St. John
At Charlotte Amalie

Civil No. 295-1953

Action for Divorce

Charles Rudolph Fenton, *Plaintiff*,
v.
Inez Dixon Fenton, *Defendant*.

Order

This matter came on for hearing February 1, 1954 on the motion of defendant for dismissal of the action herein for alleged lack of jurisdiction of the Court over the plaintiff;

Defendant appeared specially by her attorneys, Maas & Bailey (David E. Maas, Esq., of counsel);

Plaintiff appeared in person and by his attorneys, Dudley, Hoffman & McGowan (G. H. T. Dudley, Esq., of counsel);

After examining plaintiff and hearing argument on the motion, the Court being satisfied in the premises; it is hereby

Ordered, that said motion be and the same is hereby denied; and it is

Further Ordered that plaintiff pay to attorneys for defendant the following sums:

$175.00	for transportation of defendant to the jurisdiction for the purpose of appearing in the within action;
$ 50.00	for hotel expenses of defendant while in the Virgin Islands;
$100.00	for preliminary counsel fees for representation of defendant;

and it is

FURTHER ORDERED that upon payment of said funds to attorneys for the defendant as aforesaid defendant shall file her answer herein on or before March 3, 1954 and the plaintiff shall reply thereto, if necessary, on or before April 3, 1954; and that trial of the cause is hereby set for May 28, 1954, or earlier upon prior notice and approval by the Court.

In Testimony Whereof, I have hereunto set my hand and caused the seal of the Court to be affixed this 19th day of February, 1954.

HERMAN E. MOORE
Judge

Attest:
/s/ George A. Mena
GEORGE A. MENA
Clerk